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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/791,475	03/01/2004	John M. Krochta	02307O-141800US	2113

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EXAMINER	
PADEN, CAROLYN	
ART UNIT	PAPER NUMBER
1761	

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	01/18/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 3 MONTHS from the mailing date of this communication.

Office Action Summary	Application No.	Applicant(s)	
	10/791,475	KROCHTA ET AL.	
	Examiner	Art Unit	
	Carolyn A. Paden	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *22 November 2006*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-63* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-63* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *11-22-06 & 10-30-06*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-63 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-43 of U.S. Patent No. 6,869,628. Although the conflicting claims are not identical, they are not patentably distinct from each other because the Krochta patent provides for all of the basic ingredients of the presently claimed invention.

Claims 1-63 rejected under 35 U.S.C. 103(a) as being obvious over Krochta (6,869,628).

The applied reference has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art only under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 103(a) might be overcome by: (1) a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not an invention "by another"; (2) a showing of a date of invention for the claimed subject matter of the application which corresponds to subject matter disclosed but not claimed in the reference, prior to the effective U.S. filing date of the reference under 37 CFR 1.131; or (3) an oath or declaration under 37 CFR 1.130 stating that the application and reference are currently owned by the same party and that the inventor named in the application is the prior inventor under 35 U.S.C. 104, together with a terminal disclaimer in accordance with 37 CFR 1.321(c). This rejection might also be overcome by showing that the reference is disqualified under 35 U.S.C. 103(c) as prior art in a rejection under 35 U.S.C. 103(a). See MPEP § 706.02(l)(1) and § 706.02(l)(2). Krochta discloses gloss coatings for foods, including nuts. These coatings include whey protein or soy protein isolate along with a mono- or di-saccharide plasticizer. No

unobvious or unexpected difference is seen between the coating of the Krochta patent and the coating of the claims.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-10, 14-22, 25, 28-39, 43-49 and 51-54 are rejected under 35 U.S.C. 102(e) as being anticipated by McCabe (2003/0170347 or 6,830,766).

McCabe discloses a high protein foodstuff. In the PgPub At page 3, paragraphs 56-58 and in the examples on pages 4-5 a coating containing the protein and plasticizer of the claims is disclosed. In the examples, chocolate and yoghurt formulations are shown. In example 2, a dual coating composition is shown.

Claims 1, 3-8, 14, 17-22, 25, 26, 30, 32-37, 43-49 and 51 are rejected under 35 U.S.C. 102(e) as being anticipated by Best (2005/0118311).

Best discloses a low fat coating for foods that is glossy and contains a combination of sugar and hydrocolloid that may include protein. The gloss may be applied to chocolate (see paragraph 008, 009, examples 11 & 12).

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-63 are rejected under 35 U.S.C. 103(a) as being unpatentable over McCabe (2003/0170347 or 6,830,766).

McCabe discloses a high protein foodstuff. At page 3, paragraphs 56-58 and in the examples on pages 4-5, a coating containing the protein and plasticizer of the claims is disclosed. In the examples chocolate and yoghurt formulations are shown. In example 2, a dual coating composition is shown. Claim 1 appears to differ from McCabe in the recitation that the coating is a gloss coating but preamble limitations as to the appearance of the coating do not carry any weight in the claims. Claims 11-13, 23, 24, 26, 27, 40-42 and 50 appear to differ from the reference in the recitation that

they are denatured. No unobvious or unexpected difference is seen between the presence or absence of denaturing in McCabe. Proteins are known to denature with ease so one of ordinary skill in the art might expect the proteins in McCabe to be denatured. Claims 55-63 are related to the application of the coating to a nut product. Nuts are known in the art to be high protein foods. To apply the coating of McCabe to nuts would have been an obvious use of the coating of McCabe. The added bonus of increasing the shelf life of the nut would have been expected from the reduced exposure to air by the nut.

Claims 1-10, 17-24, 30, 32, 33, 35-39, 43, 45-50, 54, 55, 57, 61-63 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cook (5,705,207).

Cook discloses a glossy coating for foods that is made from gluten (see abstract). Plasticizers are added to the coating to provide gloss to the coating (example 8). The coatings can be applied to a variety of foods, including candies. In examples 15-20, vital gluten is acidified to form a suspension of protein and starch microparticles. Then the mixture is treated with starch enzyme (glucoamylase and amylase and see example 15). In example 19 this treatment process resulted in a glaze with good

gloss. The claims appear to differ from Cook in the recitation of the use of a mono, di- or polysaccharide but these saccharides are the well known result of the treatment of starch with the enzymes amylase and glucoamylase. Thus the vital wheat gluten of Cook would be expected to form the gloss coating of the claims.

No claim is allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on (571) 272-1398 or by dialing 571-272-1700. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR

system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Carolyn Paden

CAROLYN PADEN 1-11-07
PRIMARY EXAMINER 1761